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OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT,

v.

THEODORE B. OLSON, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, AMICI CURIAE

STEVEN R. ROSS (Counsel of Record),
General Counsel to the Clerk.
CHARLES TIEFER,
Deputy General Counsel to the Clerk.
MICHAEL L. MURRAY,
JANINA JARUZELSKI,
Assistant Counsels to the Clerk.

U.S. House of Representatives,
The Capitol, H-105
Washington, D.C. 20515.
(202) 225-9700
Attorneys for Speaker and Leadership Group of the House of Representatives.

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A divided panel of the court of appeals struck down Title VI of the Ethics in Government Act, 28 U.S.C. §§ 591-598 ("the Ethics Act"), which establishes the office and duties of independent counsels, as unconstitutional. In an investigation by Independent Counsel Alexia Morrison a grand jury subpoenaed three former senior officials of the Department of Justice—Theodore B. Olson, Edward C. Schmults, and Carol E. Dinkins ("the challengers"). They refused to obey the subpoenas, disobeyed a court order to comply with the subpoenas, and were held in civil contempt. At each juncture, they asked the courts to strike down this Act of Congress. The Speaker and Leadership Group of the U.S. House of Representatives ("House Amici")[1] appear in this case as *amici curiae* to

[1] The Speaker and Leadership Group consist in this case of the Honorable Jim Wright, Speaker of the House of Representatives; the Honorable Thomas S. Foley, Majority Leader; and the Honorable Tony Coelho, Majority Whip.

defend the statute, while the Department of Justice joins in the challenge (and is a "challenger").[2] House *Amici* join in the jurisdictional statement and the statement of the case by appellant Morrison.

SUMMARY OF ARGUMENT

The challengers assail the Ethics Act on three grounds: generalized notions of separation of powers, the Appointments Clause, and the "Faithful Execution" Clause. In their separation of powers challenge, they invoke as precedents cases prohibiting statutes providing for legislative appointment, legislative veto, and legislative removal. However, the Ethics Act contrasts sharply with these, for independent counsels are plainly and completely independent from Congress. Like *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245, 3261 (1986), "this case raises no question of the aggrandizement of Congressional power at the expense of a coordinate branch." In a case like this, the Court considers three factors: legislative purpose, the degree of intrusion into executive functioning, and whether the executive function is "core." *See Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245 (1986).

Congress spent five years after Watergate devising a constitutional response to the problem of conflict of interest in investigations of high government officials.[3] It is "clear that Congress did not provide for a substantive intrusion by independent counsel into the Executive Department." *In re Olson*, 818 F.2d 34, 46 (D.C. Cir. Indep. Couns. Div. 1987). The Ethics Act preserves for the Attorney General a vast array of powers, including his unreviewable discretion as to whether to invoke the statute and his authority to fire the independent counsel.

Centralized control by the Attorney General of all aspects of prosecution is not a "core" function. Courts routinely appoint officers with executive functions, from temporary United States Attorneys to prosecutors of criminal contempt cases. *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987). The manner in which the First Congress placed the "core" functions of military and diplomatic activity under centralized Executive control, as contrasted with the dispersed control of prosecution, shows how the Framers saw only the former as *bona fide* core functions.

The challengers contend further that by vesting appointments of independent counsels in a court, the Ethics Act violates both the Appointments Clause, art. II, § 2, cl. 2, and art. III. The Appointments Clause states that "the Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments." (Emphasis supplied.) An independent counsel performs a circumscribed, limited-term job, making her an "inferior officer."

The Framers were familiar with court-appointed prosecutors. For example, in 1789, the Special Judiciary Committee of the First Senate, preparing the first Judiciary bill, proposed that "each District Court shall appoint a meet Person learned in the Law to Act as Attorney for

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[2] Participation by the Speaker and Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 2860 (1986); and, *Webster v. Sun Co., Inc.*, 731 F.2d 1 (D.C. Cir. 1984).

In light of the institutional nature of this participation and the status of the House of Representatives in the government of the United States, it would appear appropriate for the Speaker and elected leaderhip of the House of Representatives to avail themselves of the right to submit a brief as *amici curiae* without the consent of the parties, in accordance with the provisions of Sup. Ct. R. 36.4. In this instance a written consent has, nonetheless, been obtained and copies of the consent letters have been filed with the Clerk of the Court.

[3] "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

the United States in such District." [4] *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1879), resolved any remaining doubts about the propriety of appointments of executive officials by the Judiciary.[5] In that definitive case, the Court upheld judicial appointments to an executive office, that of election supervisor. *Siebold* held there was "no absolute requirement" to "vest the appointment of inferior officers in that department of the government, executive or judicial . . . to which the duties of such officers appertain." 100 U.S. at 397. Rather, between the President and the "courts of law," *Siebold* held that "as the Constitution stands," the choice "is a matter resting in the discretion of Congress." *Id.* at 397-98. Once Congress chooses, "the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts." *Id.* at 398.

Finally, the challengers invoke the "Faithful Execution" Clause, complaining that the Attorney General cannot protect them, since he does not control the independent counsel and cannot remove her for less than "good cause".[6] However, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Holmes, J.) "The clause was intended to

[4] First Congress Legislative History Project, 5 *Legislative Histories* 1172-94 (Senate Bill 1 as reported to the Senate by Committee member, Senator Richard Henry Lee of Virginia on June 12, 1789).

[5] In fact, the federal courts already have the recognized and judicially approved power to appoint temporary United States Attorneys and other officials whose duties consist in whole or in part of law enforcement.

[6] With respect to the particular question of the "for cause" restriction on the Attorney General's power to remove the Independent Counsel, as to inferior officers, the "constitutional authority in Congress to vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to officers so appointed." *United States v. Perkins*, 116 U.S. 483, 485 (1886). *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958).

rule cut any power for [the President] to dispense with, or suspend, the execution of the laws." [7]

In sum, the Ethics Act implements a vital national purpose arising from the Watergate experience. It complies with the Appointments Clause's language and the "Faithful Execution" Clause's intent. The Court should uphold this Act of Congress.

ARGUMENT

I. INDEPENDENT COUNSELS COMPORT WITH THE SEPARATION OF POWERS

The challengers ask the Court to strike down this Act of Congress as violative of the principle of separation of powers, "part of 'our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.'" Slip op. at 25 (quoting *United States v. United States District Court*, 407 U.S. 297, 317 (1972)). In charging the Ethics Act with violating that principle, the challengers rely upon a line of cases which simply does not apply to the Ethics Act. Specifically, they depend heavily on three cases regarding statutes with which Congress itself sought the authority of another Branch. *Buckley v. Valeo*, 424 U.S. 1 (1976), concerned a statute authorizing Congress itself to appoint commissioners of the Federal Election Commission. *INS v. Chadha*, 462 U.S. 919 (1983), similarly concerned a statute authorizing Congress itself to operate a "legislative veto" regarding deportations. Most recently, *Bowsher v. Synar*, 106 U.S. 3181 (1986), concerned a statute authorizing the Comptroller General, who Congress itself may remove, to direct budget cutbacks.

These cases serve, not to show a fault in the Ethics Act, but to demonstrate how the Act properly accords with the principles of separation of powers, and checks and balances. In those three cases, the Court stressed that when Congress itself takes another Branch's power, it upsets

[7] Slip op. at 14 n.19 (dissenting opinion) (quotation omitted).

the system of checks and balances.[8] These cases "cluste[r] around the concept of aggrandizing one branch at the expense of another," slip op. at 2 (Ginsburg, Ruth Bader, J., dissenting).

The Ethics Act contrasts sharply with the statutes in *Buckley*, *Chadha*, and *Bowsher*, and adheres to the separation of powers, because Congress does not take any authority for itself. Independent counsels are plainly and completely independent from Congress. Unlike *Buckley*, Congress does not appoint independent counsels; unlike *Chadha*, Congress does not veto the acts of independent counsels; and unlike *Bowsher*, Congress does not remove independent counsels. Even the divided panel below admitted that "Congress' role under the Act is limited to a non-binding call for the appointment of an independent counsel and the right to receive reports from that office." Slip op. at 66. Otherwise, apart from oversight functions, after Congress enacted the statute, its role ended.[9] Then the matter became the sole concern of the Executive and the Judiciary, the two Branches involved in the workings of the statute, not Congress itself.[10]

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[8] In *Buckley*, the Court sustained the challengers' argument that "Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those will exercise such authority." 424 U.S. at 118. The *Chadha* opinion emphasized that "[t]he hydraulic pressure inherent within each of the separate Branches," including Congress, "to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 462 U.S. at 951. Finally, in *Bowsher*, the Court held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws," and "Congress cannot grant to an officer under its control what it does not possess." 106 S. Ct. at 3188.

[9] Neither section 595(e), which allows certain members of Congress to request that the Attorney General apply for appointment of an independent counsel, nor section 596(a)(2), requiring that the Attorney General report to Congress regarding any removal of an independent counsel, goes beyond long-established oversight authority. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

[10] The divided panel below attempted to analogize this statute to those in *Chadha* and *Bowsher* by arguing that "[i]f the President's au-

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This Court has laid down a pertinent line of cases regarding the separation of powers, offering correct standards for testing statutes or rules implementing legislative purposes without aggrandizing Congress itself. These cases include *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) ("*Nixon*"); *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245 (1986) ("*Schor*"); and *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987) ("*Vuitton*"). In *Schor*, decided the same day as *Bowsher v. Synar*, this Court drew the distinction between cases like *Bowsher* and *Chadha*, on the one hand, and cases like *Schor* on the other:

> Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.

106 S. Ct. at 3261.

To determine "whether Congress impermissibly undermined, without appreciable expansion of its own power,

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thority is diminished . . . . Congress' political power must necessarily increase vis-a-vis the President"; it called the statute a "flicking left jab, confound[ing] the Executive Branch in dealing with Congress." Slip op. at 67. This vague "left jab" theory proves too much. Any statute taking functions currently in a Cabinet department and shifting them to an independent regulatory commission or agency (or, if the functions are adjudicative, to a court), would be said by some to "diminish" the President's authority, just as, in that sense, any appropriation limitations or legislated sunshine requirements or treaty reservations would. Yet this Court has never adopted a test which demands that every enactment feed the Executive Branch's power, lest it complain of the law's "left jab." That kind of approach would straitjacket the govenment's ability to respond as necessary to new problems or to the lessons of experience, and would make the courts servants of an ever-growing Executive. Even Presidents do not take that approach, despite the greater likehood that they, rather than this Court, will be bent on adding to executive power. The Ethics Act was enacted in 1978, reauthorized in 1983, and again reauthorized in 1987, every time with the signature of the President.

the role of [another] Branch," *id.*, this Court applies a flexible test.[11] The test calls for consideration in this case of three main factors: the statute's legislative purpose,[12] the extent of its intrusion into the Executive function,[13] and the extent to which the function it affects is a "core" function.[14]

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[11] This Court has consistently emphasized that a "hermetic sealing off of the three branches of Government from one another" is not necessary and would, in fact, "preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). As Justice Jackson put it in an oft-quoted passage, "the Constitution diffuses power the better to secure liberty," but it also contemplated that "practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion). The Constitution requires "interdependence" and "reciprocity" as well as "separateness" and "autonomy." *Id.*

The cases of the last decade have categorically rejected the "archaic view" reflected in the opinion of the divided panel below that separation of powers mandates "three airtight departments of government." *Nixon*, 433 U.S. at 443. A crucial inquiry is whether the challenged legislation "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* In answering that question, it is both appropriate and necessary to consider "common sense." *Buckley v. Valeo*, 424 U.S. at 1, 122 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)); *see also INS v. Chadha*, 463 U.S. at 962 (Powell, J., concurring).

[12] *Schor*, 106 S. Ct. at 3258 ("the concerns that drove Congress"); *Nixon*, 433 U.S. at 443 (how much there is "need to promote objectives within the constitutional authority of Congress"); slip op. at 17 (dissenting opinion) ("the purposes of the legislation").

This factor should not be confused with a plea of necessity (regardless of constitutionality). Rather, this Court considers legislative purpose in cases which do not involve Congressional self-aggrandizement because it is obviously easier to determine whether the statute does impermissible harm if it is known why the statute is there at all.

[13] *Schor*, 106 S. Ct. at 3258 ("the extent to which the [non-Executive body] exercises the range of jurisdiction and powers normally vested only in [the Executive]"); *Nixon*, 433 U.S. at 443 ("the extent to which [the statute] prevents the Executive Branch" from proceeding); slip op. at 17 (dissenting opinion) ("the extent of the removal").

[14] *Schor*, 106 S. Ct. at 3258 ("the extent to which the essential attributes of [Executive] power are reserved" to it); *Nixon*, 433 U.S. at

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Applying that test to this statute, first, the statute aims at a legislative purpose consistent with the system of checks and balances. Congress enacted the statute as a considered response to the nation's experience with the Watergate scandal. A central aspect of that scandal had been the influence of White House staff and political appointees in the Justice Department over the Department's investigations of those same high officials. The Senate Watergate Committee found that the Watergate history "raises a serious question as to whether high Department of Justice officials can effectively administer criminal justice where White House personnel, or the President himself, are the subjects of the investigation." *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, 93rd Cong., 2d Sess. 80 (1974).[15]

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443 ("the extent to which [the statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions"); slip op. at 17 (dissenting opinion) ("whether the limitation affects a core executive function").

[15] Specifically, Congress found that in 1972 immediately after the Watergate break-in, John Dean, Counsel to the President, "arranged with Assistant Attorney General [Henry] Petersen to have [the White House staff's] depositions taken outside the presence of the Grand Jury"; through close contacts, "Dean was able to anticipate the leads the FBI would follow and coach those persons who had knowledge of the facts within [the Committee to Re-elect the President] and the White House." *Impeachment of Richard M. Nixon*: H.R. Rep. No. 1305, 93d Cong., 2d Sess. 57 (1974). As the investigation progressed, "the President continued his series of meetings and telephone calls with Petersen," *id.* at 113, which served as a conduit for information from inside the investigation to the potential targets of investigation. Effectively, Dean and the President prevented an independent investigation of the White House from even starting.

After media and court-compelled disclosures, public pressure led the Attorney General to appoint a non-statutory Special Prosecutor, Archibald Cox. Ultimately, that Special Prosecutor declined to accept President Nixon's orders "to agree to [his] proposal [regarding access to tapes] and to desist from issuing subpoenas for tapes and documents." *Id.* at 124. In response, in the "Saturday Night Massacre," President Nixon ordered Attorney General Elliott Richardson to fire Cox, the Attorney General resigned in protest, the Deputy Attorney General was fired, and the Solicitor General then fired Cox.

Accordingly, the committee recommended the creation of some kind of independent officer or agency to handle allegations of high-level misconduct. *Id.* at 96–100.

Over the following five years, the proposals for such a measure received thorough study. Congress paid close attention to the constitutional implications, taking extensive testimony from legal experts.[16] It took into account the historic national need for special prosecutors, and the recurring problems with non-statutory ones, particularly as reflected by experiences during the Grant, Harding, and Truman administrations. S. Rep. No. 170, 95th Cong., 1st Sess. 2 (1977). Numerous well-known legal scholars, such as Professors Paul Bator, Paul Freund, and Raoul Berger of Harvard University, and Professors Philip B. Kurland and Gerhard Casper of the University of Chicago testified as to the legislation's constitutionality. Similarly supportive testimony was received from the American Bar Association and from the Deans of 49 law schools, including Harvard, Yale, Chicago, Pennsylvania, Stanford, Columbia, Michigan, Wisconsin, Berkeley, Vanderbilt, Howard, and Georgetown.[17]

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[16] Over a period of about five years from the 93rd Congress until the 95th, the Legislature held lengthy hearings every year. *See, e.g., Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973); *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. (1974); *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 3036 Before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. (1975-76); *Provision for Special Prosecutor: Hearings on H.R. 14476 et al. Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976); *Special Prosecutor Legislation: Hearings on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); *Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

[17] *Special Prosecutor: Hearings*, *supra* note 16, at 351–52 (Part II).

Former Watergate Special Prosecutor Archibald Cox, testifying from familiarity with the problem, strongly supported the legislation. He explained that:

> [t]he pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy with about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.

Removing Politics From the Administration of Justice, *supra* note 16, at 200.

As the bill neared enactment in 1978, the Department of Justice endorsed it. The Justice Department's representative testified before Congress that he "support[s] this legislation, and the Attorney General supports this legislation, and the President of the United States supports it." [18] He then addressed the constitutional issues raised, foreshadowing the precise challenges made now, and explained why the Department of Justice then correctly considered them all in error:

> The Department has no objections to the manner in which the appointment process is initiated, the method of judicial appointment, or the restrictions placed on the Executive's power of removal over the special prosecutor . . . . We believe that judicial appointment is justified by the Appointments Clause, Article II, section 2, and the extraordinary circumstances which would mandate a recourse to a special prosecutor . . . [We] do not believe that an "incongruous" duty would be imposed upon the courts. *See Ex Parte Siebold*, 100 U.S. 371, 398 (1879).
>
> The extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal . . . [Supreme Court] decisions

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[18] *Public Officials Integrity Act of 1977: Hearings*, *supra* note 16 at 8 (testimony of John M. Harmon, Acting Assistant Attorney General of the Office of Legal Counsel, U.S. Department of Justice).

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> have narrowed [the discretionary removal] principle to allow for limitations to be placed with respect to those whose quasi-legislative or quasi-judicial duties require a degree of independence from the Executive. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958) . . . [O]n balance, we think that the extraordinary circumstances which would warrant a resort to a special prosecutor would also justify granting him the measure of independence provided . . . .

Id. at 15-17. Based on overwhelming evidence of both constitutional legitimacy and suitability of the means to the legislative purpose, Congress passed the Ethics Act in 1978.

Since enactment, the statute has been re-endorsed twice through reauthorizations in 1983 and 1987. Pub. L. No. 97-40, 96 Stat. 2039 (1983); Pub. L. No. 100-191, 101 Stat. 1293 (1987). On all three occasions of enactment (1978, 1983, and 1987), the President signed the bills into law, contrasting markedly with bills on which the President invoked his veto power to avert alleged constitutional intrusions.[19] A significant factor in reauthorization was Congress's careful consideration of the constitutional issues.[20]

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[19] *See, e.g.*, S. Jour., 233, 23rd Cong., 2d Sess. (1835) (President Jackson vetoes foreign claims settlement bill on constitutional grounds); 119 Cong. Rec. 16194 (1973) (veto on constitutional grounds of a bill altering office of the Director and Deputy Director of the Office of Management and Budget); 22 Weekly Comp. Pres. Doc. 1568 (1986) (veto on constitutional grounds of bill establishing a new council in the Executive Office of the President).

[20] For example, in 1981-82, a Senate committee conducted an extensive investigation of the operation of the law. *Ethics in Government Act Amendments of 1982*: S. Rep. No. 496, 97th Cong., 2d Sess. 3-4, 4-6 (1982) (describing 1981 investigation by subcommittee, and explaining why "[t]he Committee believes that the dangers of conflict of interest [addressed by the statute] were not unique to Watergate, but rather are inherent in our system of government"); *Independent Counsel Amendments Act of 1987*: H.R. Rep. No. 316, 100th Cong., 1st Sess. 20-24 (1987), cited *infra*.

As the House Committee on the Judiciary discussed in its 1987 report on the statute, "on eight occasions . . . appointments [of independent counsels] have been made a matter of public record," *Independent Counsel Amendments Act of 1987: H.R. Rep. No. 316, 100th Cong., 1st Sess.* 14 (1987):[21] for Hamilton Jordan, Timothy E. Kraft, Raymond J. Donovan, Edwin A. Meese III, Theodore B. Olson, Michael K. Deaver, "Iran/Contra," and Franklyn C. Nofziger. *Id.* at 14-19. The report reflects not only how the statute has averted the substance or appearance of conflict of interest in investigation of high government officials, but also how the statute benefitted the individuals under investigation. An independent investigation provided them with the opportunity for credible exoneration on the charges investigated, rather than recurring suspicion of improper influence, when decisions were made not to prosecute.[22] In sum, the legislation responded to both historical and recent experience, employed means tailored to the support of the system of checks and balances, reflected careful constitutional study, and even received the constitutional blessing on all issues of the Branch affected.

The second factor weighed by the *Schor-Nixon-Vuitton* line of cases concerns the "extent of the intrusion" on the Branch in question. Challengers of the Ethics Act contend that it cuts into the Attorney General's powers since the courts (in particular, the Independent Counsel Division of the United States Court of Appeals for the District of Columbia) (or "Special Division") appoint the Independent Counsel, and since the Attorney General can remove her only for "good cause." The individual chal-

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[21] There has additionally been an independent counsel who resolved a tax matter concerning a Department of Justice official, which has received press attention although it has not officially been made public.

[22] For example, the 1984 investigation of Edwin A. Meese III, then Counselor to the President, which concluded that there was no basis for prosecution, *see* H.R. Rep. No. 100-316, *supra*, paved the way for his confirmation as Attorney General.

lengers complain that the asserted usurpation of the Attorney General's authority subjects them to overzealous prosecution.[23] While the appointment and removal provisions raise particular constitutional issues addressed in Parts II and III below, they receive consideration as part of this factor in the separation of powers challenge.

However, the suggested intrusive transfer of all power away from the Attorney General simply does not take place. Congress preserved for the Attorney General an array of powers limiting the intrusion of the Ethics Act. The Attorney General possesses unreviewable discretion regarding when to invoke—and when not to invoke—the statute. As the 1987 conference reported noted, "the conferees agree that no judicial review is available of decisions by the Attorney General not to conduct preliminary investigations". *Independent Counsel Reauthorization Act of 1987*, H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987). Mr. Schmults and Ms. Dinkins are prime examples. Because the Attorney General decided, in his unreviewable discretion, against their prosecution, the Special Division refused to grant the Independent Counsel's request to change the "current order [which] grants the Independent Counsel jurisdiction to *prosecute* only Olson." *In re Olson*, 818 F.2d 34, 48 (D.C. Cir. Indep. Couns. Div. 1987) (emphasis in original). Hence, Mr. Schmults and Ms. Dinkins can complain only of being the subjects of investigation, not prosecution.

The Attorney General's demonstrated power to create, to shape, and hence to restrict the jurisdiction of an Independent Counsel serves as only one item on an imposing list of powers vested in the Attorney General. As the Special Division noted of the Attorney General:

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[23] As the divided panel contended: "In effect, an entire self-sufficient government agency is created from scratch to investigate and perhaps prosecute a single individual. The need to justify even the expense of an office dedicated solely to one goal must generate a reluctance to decide against indictment . . . ." Slip op. at 70-71. Of course, most Independent Counsels have not indicted anyone.

(a) [He] conducts the investigation and determines whether the information is sufficient [to proceed] . . . .

(b) [He] also determines whether the investigation of other persons [by the Justice Department] . . may result in a . . . conflict of interest.

(c) . . . [H]e has discretion to conduct "such preliminary investigation of the matter as [he] . . . deems appropriate."

(d) If [he] . . . finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, he notifies the Division of the Court and his decision is final. Thereafter the Division of the Court shall have "*no power to appoint an independent counsel.*"

(e) . . . [It is he who] applies to the Division of the Court for the appointment of an independent counsel.

(f) . . . [Even if at first he decides not to apply,] he may still, on the basis of additional information, apply [later] for appointment of an independent counsel.

(g) [His application gives him] the power to suggest . . . the nature and extent of the jurisdiction that should be set forth in the Division's order.

(h) [He] may request the independent counsel to accept referral of a [related] matter.

(i) [His determination to apply] for the appointment of an independent counsel *is not reviewable in any court.*

(j) [He] may request the Division of the Court to disclose the identity and prosecutorial jurisdication of such independent counsel . . . .

(k) [He may request the Special Division] to expand the prosecutorial jurisdiction of an existing independent counsel.

(l) Upon showing of good cause by the Attorney General, the Division of the Court may grant an extension of the preliminary investigation . . . .

(m) [His] authority . . . [over] those [electronic interception] matters that specifically require [his] personal action . . . is not affected.

(n) The Department of Justice has discretion to assist the independent counsel at his request.

(o) [He] may, at the request of the independent counsel, refer a [related] matter. . . .

(p) An independent counsel . . . is required to comply with the . . . policies of the Department of Justice . . . .

(q) An independent counsel may dismiss matters . . . prior to prosecution only upon compliance with the . . . policies of the Department of Justice . . . .

(r) The majority and minority members of the Judiciary Committees of Congress separately may request in writing that the Attorney General apply for the appointment of an independent counsel . . . .

(s) The Attorney General may by "personal action" remove from office an independent counsel [for good cause] . . . .

(t) The Division of the Court upon suggestion of the Attorney General may terminate an office of independent counsel at any time . . . .

(u) . . . [A]n independent counsel . . . may agree in writing that such investigation or proceedings may be continued by the Department of Justice.

(v) The Attorney General or the Solicitor General may make a presentation as *amicus curiae*, to any court . . . [where] the independent counsel participates . . .

In re Olson, 818 F.2d 34, 45-6 (D.C. Cir. Indep. Couns. Div. 1987) (emphasis in original; statutory citations omitted).

The Attorney General's powers include the most formidable: to remove the independent counsel, pursuant to 28 U.S.C. § 596(a). A number of factors emphasize the strength of the Attorney General's removal power. An independent counsel does not discharge his duties in obscurity. Rather, as recent experience bears out, Attorneys General follow their work, often quite closely; criticisms of an independent counsel readily come to the Attorney General's attention. The Attorney General's removal power provides a potent tool, even though the Attorney General does not himself appoint the independent counsel. "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 106 S. Ct. at 3188 (quotation omitted).

As amended, the statute provides for removal of the independent counsel by "personal action of the Attorney General," for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a). What constitutes "good cause" will be decided, in the first instance, by the Attorney General. It would be a rare Attorney General who would fire an independent counsel and not maintain he had good cause to do so. Conversely, if the Attorney General has good cause, the statute does not impair his ability to act.

The Attorney General's extensive retained power "makes it clear that Congress did not provide for a substantive intrusion by independent counsel into the Executive Department," *In re Olson*, 818 F.2d at 46. On the contrary, in Congress's 1987 revision of the ethics law, the conference committee went out of its way to affirm the unreviewable nature of the Attorney General's strong retained authority:

> [t]he conferees agree that an Attorney General's determinations under the independent counsel law are not subject to judicial review. This includes such determinations as whether to investigate a person under section 591(c), whether to exercise recusal from a case, and whether to request appointment of an independent counsel.

Independent Counsel Reauthorization Act of 1987, H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987).

Moreover, the Ethics Act in no way intrudes upon what the Framers considered the most potent protection for high government officials wielded by the President on advice from the Justice Department, namely, his pardon power. Art. II, § 2, cl. 1 provides that "[t]he President . . . shall have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Im-

peachment." [24] Edward Randolph warned, "the prerogative of pardon in [treason] cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments." 3 *Records of the Federal Convention of 1787*, at 626 (M. Farrand ed. 1911); *accord id.* at 639. By creating the prerogative of pardon, the Framers explicitly determined the means by which the President could protect his "own instruments"—such as the challengers in this case—from prosecution. Only for the pardon power, not for any kind of implicit ban against truly independent investigations, did the Framer's defend such controversial protection of high officials.[25]

The third factor in the *Schor-Nixon-Vuitton* line of cases concerns whether a statute impairs a "core" executive function, like diplomacy or command of the military.[26] This Court has been sparing in its designation of

[24] If an Attorney General requests appointment of an independent counsel and the Independent Counsel pursues high officials in the Department of Justice or the White House, but in the end, the President determines to stop that pursuit—much as President Ford decided in the end to pardon former President Nixon rather than let a special prosecutor proceed—nothing in the Ethics Act interferes with his doing so.

[25] *See The Federalist, No. 69* at 418–19 (C. Rossiter ed. 1961) (Hamilton noting the availability to the Governor of New York, as well as to the President, of the pardon power if either "should be at the head of any such conspiracy," while defending the President's pardon power because it did not block impeachment); *id., No. 74* at 448 (Hamilton, again defending the pardon power's reach, admits that "in relation to the crime of treason . . . . the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded").

[26] In its opinion below, the two-judge majority argued that "we cannot see how prosecution of federal criminal law can be other than an inherent, or core executive function." Slip op. at 51. The majority opinion below quotes from the opinions of Justice White, but these disprove the challengers' own thesis. Two of the quotes concern, not what must be left to the President, but what must *not* be taken over by Congress. Slip op. at 51 (citing *INS v. Chadha*, 462 U.S. at 1002) (White, J., dissenting) (questioning a "*legislative* check" on executive functions) and *Buckley v. Valeo*, 424 U.S. at 285 (White, J., concurring in part

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"core" executive functions and requires the function at issue to be carefully defined. Beginning with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court distinguished between two types of executive functions. First, there are "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive." *Id.* at 170. Second, there are other matters where an executive officer "is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid . . . ." *Id.* at 171. The President controls the first category, but the latter category includes duties "in the execution of which [the officer] is independent of all control but that of the laws." *Id.* at 149; *see also id.* at 139–40. Again, in a later historic case, the Court considered the "chain of command" theory and its relation to the "Faithful Execution" Clause, and parsed duties into the same two kinds, those under Presidential control, and others not under such control.[27]

and dissenting in part) (concerning if *Congress* purported to usurp the functions). (Emphasis supplied in both.) The third quote only states that there are some executive functions that "must be performed by officers subject to removal at will by the President," Slip op. at 51, (quoting *Bowsher v. Synar*, 106 S. Ct. at 3207) (White, J., dissenting); it does not say that inherently conflicted prosecutions are such a function.

[27] The divided panel below suggested this Court has thereby put only ministerial actions outside the President's absolute control, slip op. at 26 n.21, but that neither fits the manifest higher purpose of *Marbury* and *Kendall* nor the later pronouncement of this court in *Myers v. United States*, 272 U.S. 52, 132–33 (1926).

> In *Myers*, the high-water mark of the Supreme Court's upholding of the presidential powers of direction and removal, the Court cited *Kendall* while distinguishing executive duties "sometimes described as political" from "other duties." [*Myers*, 272 U.S. at 132–33]. *Myers*' distinction between "political" and other duties expressly acknowledged the differences

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In *United States v. Nixon*, 418 U.S. 683, 710 (1974), the Court noted the "utmost deference" shown to the "Presidential responsibilities" for "military or diplomatic" matters. The Court declined to show the same "high degree of deference to a President's generalized interest in confidentiality." *Id.* at 711. The question is not whether prosecution in some global sense is a "core" function, for the Ethics Act leaves many aspects of prosecution to the Attorney General—such as deciding whether to initiate an inquiry, whether to request appointment of an independent counsel, and whether to remove one for "good cause"—and places the other functions in the hands of an independent counsel, indistinguishable in many respects from other federal prosecutors. Defined carefully, the particular loss to the Attorney General is of centralized control of certain stages of prosecution.

A President does not have the same high interest in the centralized control of these stages of prosecution, occurring after the initiation by the Attorney General, as he has in his responsibility for military and diplomatic matters; he has only a general preference for such centralized control.[28] In fact, the federal courts already have the recognized and judicially approved power to appoint certain persons whose duties consist in whole or in part

in "the degree of guidance . . . that the President may exercise over executive officers," based upon the "character of their service as prescribed in the law under which they act." [*Id.* at 132.] The *Myers* Court set apart from other executive duties those duties that were "so peculiarly and specifically committed to the *discretion* of a particular officer as to raise a question whether the President may overrule or revise the officer. . . ." Thus, the Court recognized that Congress may vest discretion in an executive officer not subject to presidential direction.

Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. Rev. 59, 88–89 (1983) ("*Independent Officers.*").

[28] As discussed below, the President lacks a textual interest arising from the Constitution's "Faithful Execution" Clause.

of prosecution. *Ex Parte Siebold*, 100 U.S. 371 (1879), the leading case on court appointments (discussed further below), itself sanctions having judges choose officials with enforcement authority.[29]

The federal courts appoint U.S. Commissioners who "institute prosecutions under laws relating to the elective franchise and civil rights." *Go-Bart Co. v. United States*, 282 U.S. 344, 353 n.2 (1931); *see also Rice v. Ames*, 180 U.S. 371 (1901). Courts appoint temporary U.S. Attorneys to fill vacancies, under a statute adopted in 1863. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963); *United States v. Mitchell*, 136 F. 896, 906 (C.C.Or. 1905). These temporary appointees, unlike the Independent Counsel, exercise the full range of traditional law enforcement authority.[30]

Actions by the First Congress show persuasively why centralized control of all aspects of prosecution has not been considered a "core" function.[31] That Congress established the first three government departments: Foreign Affairs (later State), War, and Treasury. The charters for the two departments serving the military and diplomatic functions included statutory injunctions of obedience, which directed them to "perform and execute such duties as shall be enjoined on or entrusted to [them] by the

[29] The election supervisors discussed in *Siebold* served the law enforcement function of deciding who to arrest for election fraud. For a description of their functioning, *see* H. Rep. No. 218, 44th Cong., 2d Sess. (1877) (a report by the House Select Committee on Alleged Fraudulent Registration and Fraudulent Voting in the Cities of New York, Philadelphia, Brooklyn, and Jersey City).

[30] Courts have also been permitted to appoint a variety of other officers. *See Collazo v. United States*, 196 F.2d 573, 582 (D.C. Cir.), *cert. denied*, 343 U.S. 968 (1952); *Birch v. Steele*, 165 F. 577 (C.C.A. Ala. 1908) (bankruptcy referees); *Hobson v. Hansen*, 265 F. Supp. 902, 914–15, 902 (D.D.C. 1967) (three-judge Court) (D.C. Board of Education) (discussing also the many different types of appointments the courts are empowered to make), *appeals dismissed*, 393 U.S. 801 (1968).

[31] *See, e.g., Myers v. United States*, 272 U.S. 52, 174–75 (1926) (importance of the First Congress's actions as a guide to constitutional interpretation).

President of the United States."[32] Clearly, the First Congress anticipated and guaranteed centralized Presidential control of such functions.

In contrast, the First Congress did not place such value on centralized control of prosecution, nor does the Executive Branch of that era appear to have been perturbed or concerned. Congress and the President left such prosecution in the hands of "district attorneys" who performed litigative services for federal officials on a fee basis. The Attorney General had no control over them, since his prime function was to advise the President and the Cabinet; the district attorneys functioned virtually on their own.[33] In the First Congress, court appointment of prosecutors came under consideration: in 1863, it was enacted into a law still in effect today, 28 U.S.C. § 546, providing for court appointment of temporary United States Attorneys. Thus, court-appointed prosecutors predated the Department of Justice, which Congress did not create until 1870.

Moreover, creation of special prosecutorial offices with insulated from political interference, has long been part of American history. Examples at the state level include Thomas E. Dewey's antiracketeering operation in New York in the 1930s; at the federal level, examples include investigations regarding Teapot Dome of the 1920's, and tax corruption in the Truman Administration.[34] Of course, the example best known today is Watergate, when this Court approved the regulations which sought to guar-

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[32] Act of July 27, 1789, ch. 4, sec. 1, 1 Stat. 28 (1789) (Department of Foreign Affairs), *amended by* Act of September 15, 1789, ch. 4, 1 Stat. 68 (1789) (changing title to Department of State); Act of August 7, ch. 7, sec. 1, 1 Stat. 49 (1789) (Department of War).

[33] L. White, *The Federalists: A Study in Administrative History* 133, 144, 406-11 (1948); *Independent Officers, supra* note 27 at 71-72, 74-75; *see In re Olson*, 818 F. 2d 34, 46 (D.C. Cir. Indep. Couns. Div. 1987).

[34] *In Re Olson*, 818 F.2d at 39-41 (Teapot Dome and Truman Administration); Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 Am. Crim. L. Rev. 577, 578 n. 5 (1973) (Dewey).

antee a Special Prosecutor's independence. *United States v. Nixon*, 418 U.S. 683, 695-96 & n. 9 (1974).

Young v. United States ex rel. Vuitton et Fils S.A. provides a recent model for how prosecutors appointed by the courts may serve special needs without centralized control by the President or the Attorney General. In that case, the defendants challenged Federal Rule of Criminal Procedure 42(b), which provides for commencement of such criminal contempt cases either "on application of the United States attorney or an attorney appointed by the court for that purpose. . . ." *Id.* at 2130.[35]

This Court rejected the argument that "prosecution of [contempts] may be initiated only by the executive branch," *id.* at 2132, and held "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such prosecution," *id.* at 2134. The Court regarded prosecution as not so uniquely executive as to preclude evaluation of that Rule's purposes. "Courts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated." *Id.* at 2131. *Vuitton* is one of many current exceptions to centralized Attorney General control. As a prominent example, the federal grand jury itself, although often steered in its mission by Justice Department prosecutors, has an important reserve of authority independent of the Executive Branch and subject only to judicial supervision.[36]

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[35] The district court had appointed two attorneys to prosecute defendants in criminal cases for contempt of a trademark infringement injunction. Upon conviction by a jury, defendants received sentences ranging from six months to five years in prison. 107 S. Ct. at 2128-29. The defendants "contend[ed] that the District Court lacked authority to appoint *any* private attorney to prosecute the contempt action against them, and that, as a result, only the U.S. Attorney's Office could have permissibly brought such a prosecution." *Id.*

[36] Fed.R.Crim.P. 6(a)-(c) (judicial supervision of grand jury); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (broad grand jury investigative powers); *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973) ("The federal grand jury is . . . legally independent of the Executive . . . . If the grand jury were a legal appendage of the Executive, it could

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Thus, the function at issue here, of centralized control of some aspects of the prosecution of high government officials, differs from *bona fide* "core" functions such as diplomacy, or command of the military. The Ethics Act leaves so large a role to the Justice Department that its intrusiveness is quite limited. The Act serves a high purpose, carefully measured out by enactment based upon extensive and twice-reaffirmed consideration of the issues. By the standards this Court uses for statutes which in no way grant Congress itself any appointment, veto, or removal powers, the Ethics Act comports clearly with the separation of powers.

II. "COURTS OF LAW" MAY CONSTITUTIONALLY APPOINT INDEPENDENT COUNSELS

The challengers present two Appointments Clause grounds for striking down the challenged Act of Congress. First, pursuant to that Clause, "principal" officers (i.e., those not "inferior") receive appointments only after nomination by the President and confirmation by the Senate. Through the Ethics Act, an independent counsel receives his appointment without such nomination and confirmation. The challengers maintain that an independent counsel is a principal, not an inferior, officer, and, therefore, concluded that the Ethics Act violates the Appointments Clause. Slip op. at 10-23. Second, the challengers assert that the Ethics Act must fall even though it follows the plain language of the clause allowing appointment by the "Courts of Law" (here, the "Special Division" of the D.C. Circuit) because of supposed incompatibility between the executive nature of such counsels and judicial appointment.

By its express language, the Appointments Clause, art. II, § 2, cl. 2, states that the President:

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hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places."); Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 Yale L.J. 1692, 1701-06 (1978).

> shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior officers, as they think proper*, in the President alone, *in the Courts of Law*, or in the Heads of Departments.

(Emphasis supplied.)

That Clause expressly and repeatedly authorizes Congress to vest appointment power in "Courts of Law." "Congress" performs the investing. The vesting occurs "by Law," meaning by an act of Congress. Above and beyond this, the Framers added the extraordinary phrase, "as they think proper," thereby stressing that the Clause leaves the decision to what "they," the Congress, "think."

The challengers of this Act of Congress fail to pay any reasonable deference to the plain language of the Constitution. "To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. 'In expounding the Constitution of the United States . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added. . . .'" *Wright v. United States*, 302 U.S. 583, 588 (1938) (Chief Justice Hughes). "[W]e cannot for a moment believe that a single superfluous word was used . . ." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840). The phrase, "as they think proper," refutes any theory of implicit restriction; the Framers could hardly have picked a phrase more indicative of discretion and more antithetical to restriction. It strains credulity to suggest that the Framers would have chosen that phrase if they meant the Clause to place unstated limits on what types of appointment could be vested in each of the three alternatives.

As its first ground for the Appointments Clause challenge, the two-judge majority below concluded that "the

independent counsel's authority is so broad as to compel the conclusion that she is a principal officer . . . ." Slip op. at 21. Under the Supreme Court standard enunciated in *United States v. Germaine*, 99 U.S. 508, 509-10 (1878), and reaffirmed in *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), "inferior officers" are any "officers inferior to those especially mentioned." "Inferior" does not mean "petty or unimportant" but simply having "less power" and "inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments." *Collins v. United States*, 14 Ct. Cl. 568, 574 (1878). *See United States v. Eaton*, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.").

The Attorney General, a "head of department" since 1870, directs prosecutions nationwide, and even a United States Attorney directs prosecutions districtwide, both with long-term tenure. In contrast, the Ethics Act gives an independent counsel narrowly circumscribed duties and an inherently limited-term job status. The independent counsel has authority only regarding a specific grant of jurisdiction.

This particular Independent Counsel illustrates those narrow bounds. Her efforts to broaden her prosecutorial authority from one former Justice Department official (Mr. Olson) to three, relying on her investigation, have been rejected by the Attorney General and, therefore, by her appointing court. *See In re Olson*. The Attorney General all but acknowledged an independent counsel's nature as an inferior officer when he issued Independent Counsel Lawrence E. Walsh, and other independent counsels, parallel "Special Prosecutor" appointments, reminiscent of those received by the Watergate Special Prosecutors. The Attorney General, as a "head of department,"

could appoint Walsh only because the independent counsel was an inferior officer.[37]

Congress itself clearly viewed the independent counsel as an "inferior officer," and rejected contrary notions for good reason. As the House Committee on the Judiciary found:

> This discretionary power of the Attorney General to ask for the appointment of an independent counsel clearly establishes the independent counsel as an "inferior" officer whose very existence is contingent upon the action of the Attorney General. In addition, these independent counsel are inferior officers in the sense that they are of lesser importance and are confined in their duties to a single investigation of a temporary nature. The argument that for these officers to be "inferior" requires that they have superiors in a direct supervisory role is refuted not only by this understanding of "inferior", but also by the fact that the officials whose appointment was validated in *Ex Parte Siebold* had no direct supervisory officials, but were inferior in the sense used here.

H.R. Rep. No. 100-316, *supra*, at 23. "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). An independent counsel is, at most, an inferior officer.[38]

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[37] If the Attorney General agreed with the two-judge majority below that Walsh were a principal officer, he would instead have had to leave the appointment to the President and the Senate.

[38] Subsequent judicial interpretation has added a third category to the two previously mentioned—"employee." *United States v. Germaine*, 99 U.S. 508 (1878), held that a civil surgeon appointed pursuant to statute by the Commissioner on Pensions was not an inferior officer but merely an employee. The term "officer", the Court said, "embraces the idea of tenure, duration, emolument, and duties, and that the latter were continuing and permanent not occasional or temporary." *Id.* at 511-12. Noting that the surgeon acts "only when called on . . . in some special case," is not paid through "regular appropria-

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Separately, the challengers urge that the courts should not have apointment authority for an officer with the independent counsel's executive functions. Slip op. at 29–42. Their theory is that the "Courts of Law" may only appoint officers subordinate to judges, such as clerks of courts, not an officer with executive functions. However, the plain language of the provision imposes no such restriction, and none can be found in the contemporaneous understanding of the Framers.

In the Framers' era, characterized by wide variety in methods for appointing government attorneys, court appointment of prosecutors certainly was not unusual, and may have been common.[39] State models certainly influ-

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tion," and may not be called upon in a given year, the Court determined that the surgeon's duties were "not continuing and permanent" but merely "occasional and intermittent." *Id.* at 512.

Similarly, in *Auffmordt v. Hedden*, 137 U.S. 310 (1890), the Court held that a merchant appraiser was a mere employee, "an expert, selected as an emergency arises." *Id.* at 326. He had "no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case." *Id.* at 327. Given the temporary and one-time-only nature of the Independent Counsel's job, she could conceivably be classed as a mere employee, a possibility alluded to by the Solicitor General. *See* Brief for the United States as *Amicus Curiae*, *Young v. United States ex rel. Vuitton et fils S.A., et al.*, Nos. 85-1329 & 85-6207 (U.S., filed Oct. 1986) at 17.

[39] By the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies and had been replaced by a series of public officials who were charged with handling criminal matters. The nature of these officials varied. Some were county officials *appointed by the courts*; some were deputies of the Attorney General but were *nominated by the county court* and operated with little supervision; some were deputies of the Attorney General directly under his view.

J. Jacoby, *The American Prosecutor: A Search for Identity* 19 (1980) (emphasis supplied). For the wide variety in state methods for choice of Attorneys General, see Mass. Const., art. XVII (1780) (Attorney-General elected); Va. Const. (1776) ("The two Houses of Assembly shall, by joint ballot, appoint Judges . . . and the Attorney-General"); Del. Const., art. 12 (1776) ("The president and privy council shall appoint

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enced the Framers.[40] For example, an important model for the Framers, New York's Constitution of 1777, provided "that all attorneys, solicitors, and counsellors at law hereafter to be appointed, be appointed by the court . . ." New York Const., art. XXVII (1777). In other words, in New York State, where *The Federalist* was published and the First Congress met, courts appointed the prosecutors.

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the secretary, [and] the attorney-general . . . ."); S.C. Const., art XXIX (1978) ("That two commissioners of the treasury . . . [and the] attorney general . . . [shall] be chosen in like manner by the senate and house of representatives jointly, by ballot"); Pa. Const., sect. 20 (1776) ("The president . . . with the council . . . shall have power to appoint and commissionate [sic] judges . . . [the] attorney general and all other officers . . . ."); N.C. Const., art. XIII (1776) ("the General Assembly shall . . . appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney General . . . ."); N.H. Const., Part II (1784) (unnumbered article headed "Executive Power—President") ("All judicial officers, [and] the attorney-general . . . shall be nominated and appointed by the President and council").

A number of states included their attorney general in the same constitutional provision as judges. *See, e.g.*, N.J. Const. art. XII (1776) (appointment by the Council and assembly prescribed in the same article for attorney general, judges, justices of the peace, and clerks).

The non-Executive appointment of state Attorneys General survived the infancy of the Republic. Even today the Attorney General of the State of Tennessee is appointed by that state's Supreme Court rather than by the Governor. Tenn. Const., art. 6, § 5, Tenn. Code Ann. § 8-6-101.

[40] Hamilton remarked that the plan adopted for the judiciary at the Constitutional Convention was not "novel and unprecedented" but instead derived from provisions in the constitutions of several states. *The Federalist* No. 81 (C. Rossiter ed. 1961). These state constitutions served as "models" for the judicial structure created by the Framers and, as Hamilton noted, "[t]he preference has been given to these models is highly to be commended." *Id.* These included Georgia, which, as quoted above, provided that the justices of the State Supreme Court could appoint, *pro tempore*, the "attorney for the State." Three other states which had made Hamilton's list of preferred models—Virginia, North Carolina, and South Carolina—provided that the State Legislature could appoint the state Attorney General. In short, at the time the Constitution was adopted there was ample precedent for the appointment of government attorneys by entities other than the Executive.

That Constitution's language authorizing "Courts of Law" to make appointments reflects the Framers' familiarity with, and acceptance of, the New York model. Considering that prosecutors have always been "officers of the court," if the Framers wished to prevent the "Courts of Law" from appointing such "officers of the court," they would have used language expressing such a limit, as the Framers did when they allowed Congress to appoint only legislative officers. *Buckley v. Valeo*, 424 U.S. at 127–28.

Moreover, the actions of the Special Judiciary Committee of the First Senate demonstrate that its members saw nothing in the Constitution requiring that the President have exclusive control of appointment. In the spring of 1789, the nation's First Congress gathered in New York City. The very first substantive business taken up by the Senate was the creation of a judicial system.[41] Once a quorum was established on April 6, 1789, the Senate appointed a Special Judiciary Committee consisting of eight Senators. Eventually, two additional members were added so that the Special Judiciary Committee was composed of one-half of the entire Senate, ten members, one from each state that had sent Senators to New York. Of the eight original Committee members, five "had served in the Federal Convention of 1787 and were familiar with its intent as to the Judiciary." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57 (1923) (citing *Wisconsin v. Pelican Insurance Company*, 127 U.S. 265, 497 (1888)). Because so many of the Committee's members "had taken part in framing th[e] instrument," the content of the Judiciary Act "is contemporaneous and weighty evidence of [the Constitution's] true meaning." *Id.*

This first Judiciary bill addressed, among other things, the problem of securing attorneys for the federal govern-

[41] The task of creating the great executive departments—Foreign Affairs, War, and Treasury—had already obtained the attention of the House of Representatives.

ment.[42] Section 32 of the Committee bill provided for appointment of the district attorneys that:

> . . . each *District Court shall appoint* a meet Person learned in the Law to act as Attorney for the United States in such District, and shall swear him to the faithful Execution of his Office, whose duty it shall be to [prosecute] in such District all Delinquents for Crimes & Offences, cognizable under the authority of the United States and all [ci]vil Actions [in which] the United States shall be concerned. . . .[43]

(Emphasis supplied). The bill provided further regarding appointment of the Attorney General, that "*the Supreme Court shall also appoint* a meet person learned in the Law to act as Attorney General for the United States . . .

[42] It is illuminating that the topic of attorneys for the United States was considered germane to the creation of the Judiciary rather than to the parallel creation of the Executive Branch which was then underway in the House.

[43] Noted judicial historian Charles Warren discovered the original handwritten Senate Judiciary Committee bill, S. 1, 1st Cong., 1st Sess. (1789). Up until his article, Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923), "no adequate account of this famous legislation ha[d] ever been written." *Id.* at 49. Even the "able and careful biographer" of Senator Oliver Ellsworth, principal draftsman and floor manager of the bill, thought in 1905 "that no complete history of the bill [could] be written." *Id.* (citing W.G. Brown, *Life of Oliver Ellsworth*).

What Warren describes as "[r]ecent researches by the present writer" turned up the long sought original papers. That find allowed Warren to describe in detail the journey of the historic bill from Committee consideration through final passage. It also allows us, in 1988, to learn the original intent and understanding of the Farmers as to the requirements of the Appointments Clause with respect to federal attorneys. The handwritten original is in the National Archives and is now available in reproduction. The source for the language quoted herein is the First Congress Legislative History Project, 5 *Legislative Histories* 1172–94 (Senate Bill 1 as reported to the Senate by Committee member, Senator Richard Henry Lee of Virginia on June 12, 1789). The language in quotes was supplied by the editors of the legislative history project from reference to a printed copy found in the Broadside Collection.

whose duty it shall be to prosecute and conduct all Suits in such Court in which the United States shall be concerned. . . ." *Id.* (emphasis supplied).

Thus, a Committee of half the first Senate, composed in large part of veterans of the Constitutional Convention, decided to vest the appointment of all the government's attorneys in the courts, as in the constitution of New York State. Evidently, they saw no inconsistency between the Appointments Clause they had agreed to in 1787 and the court-appointed federal attorneys they decided on in 1789. The evolution of a compromise law [44] shifting the appointive authority from the courts to the President illustrates the discretion vested by the Appointments Clause in Congress.[45] That ultimate decision stemmed

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[44] Vice President John Adams, from his perch presiding over the Senate, noted to a friend that

> The judicial bill is still under consideration of the Senate and altho' it has undergone many alterations and amendments it is impossible to say what further changes may be made in the house of representatives. The district Judges may be annihilated altogether, and the number of supreme judges as well as the number of circuits doubled. The Attorney general is now to be appointed by the President with the consent of the Senate, . . . we are upon an amendment made a few days ago, if this plan continues the Attorney Gen. will appoint persons to act for him or the court will appoint in his appearance in the district courts.

John Adams to Francis Dana, June 10, 1789, from the Massachusetts Historical Society, Adams Manuscript Trust.

[45] Ellsworth appears to have been moved to alter the appointing authority by Chancellor Robert Livingston. During the spring and summer of 1789, Ellsworth circulated the draft bill to many learned men. Livingston responded that he had "read it over with attention, & am much pleased with the system as both cheap & expeditious." Robert Livingston to Oliver Ellsworth, June 26, 1789, Huntington Library, San Marino, California. Though "much pleased," Livingston detailed a number of suggestions and observations including his belief that only one circuit would be necessary, a call for a limitation (based on the importance of the case) on diversity jurisdiction, an alteration in the power to grant new trials and his belief that it would be "better" that "the Attorney General be appointed by the Executive to which department he necessarily belongs." *Id.*

not from any constitutional mandate but simply from discretionary choice.

The Court's opinion in *Ex Parte Siebold*, 100 U.S. 371 (1879), resolves any remaining doubts. In *Siebold*, this Court upheld a statute vesting in the courts the power to appoint election supervisors, an executive office, rejecting a challenge that the office was one for which only the President could appoint. The Court stated that:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is *no absolute requirement* to this effect in the Constitution . . . .
>
> [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, *is a matter resting in the discretion of Congress*. And, looking at the subject in a practical light, it is perhaps better that it should rest there.

Siebold, 100 U.S. at 397–98 (emphasis supplied).

Siebold set as its implied limit that there be "no such incongruity in the duty required as to excuse the courts from the performance, or to render their acts void." *Id.* 398. The parade of potential horribles used by the challengers ignores this limit of "incongruity", which excludes judicially-appointed generals or assistants to the Secretary of State. However, the Independent Counsel's duties lie appropriately within the competence and sphere for appointment by judges. A prosecutor serves as an officer of the court, working in and around the court, subject to the rulings and instructions of the court. He is "the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer." *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. at 2135 (quotation omitted) (describing the function of a court-appointed prosecutor of criminal contempts). Even the panel majority below conceded that "[o]f course most

judges have a good deal more experience with criminal prosecution than with foreign affairs." Slip op. at 41.

Appellees' challenge to judicial appointment on incompatibility grounds overlaps with a similar challenge on Article III grounds. The Article III challenge goes on to criticize not only court appointment of the independent counsel, but also court issuance of the order defining her jurisdiction (and the statutory provision, never yet invoked, for judicial termination of a runaway counsel's office). Slip op. at 74–87. However, as the dissent below noted, in issuing its jurisdictional order the Special Division acts upon the Attorney General's submission. Slip op. at 8–9 (dissenting opinion). Issuance of such an order is a function implicit in appointment of a temporary officer. *Id.* at 37.

The Special Division's function in making this appointment comports with the classic judicial function of preserving the integrity of the judicial process.[46] Judicial appointment which avoids the appearance of prosecutorial bias was the goal approved in *Young v. U.S. ex rel. Vuitton et Fils S.A.*[47] In separating the choice of prosecutors

[46] As the Fifth Circuit noted in *United States v. Cowan*, 524 F.2d 504, 512 (5th Cir. 1975), *cert. denied sub nom. Woodruff v. United States*, 425 U.S. 971 (1976), it is "manifestly clear" that Supreme Court doctrine "clothe[s] the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice. . . ."

If aspects of the Special Division's role are not incidental to the appointment function, the Special Division may handle them as Article III cases or controversies. Slip op. at 38 (dissenting opinion).

[47] Because "[p]ublic confidence in the disinterested conduct of [the prosecution] is essential," the Court, in *Vuitton*, announced "a categorical rule against the appointment of an interested prosecutor." *Vuitton*, 107 S. Ct. at 2141. The Court concluded that bias or even the appearance of bias posed so great a threat to the integrity of the judicial process and to public confidence in the courts that harmless error analysis could not even be contemplated. *See id.* at 2138–2141. " '[J]ustice must satisfy the appearance of justice,' " and "a prosecutor with conflicting loyalties presents the appearance of entirely the opposite." *Id.* at 2140 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

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for high government officials from those officials and their colleagues, the Ethics Act merely carries out to the extent necessary the ancient maxim that no man should be judge or prosecutor in his own case. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955). As described above, today courts appoint officers to a range of posts with executive functions, from temporary United States Attorneys to U.S. Commissioners.[48]

The Court's opinion expresses abhorrence for the very idea of bias in prosecution and repeatedly emphasizes that impartiality—both real and apparent—are absolutely essential to the administration of justice. The prosecutor is not the representative of "an ordinary party" but "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Vuitton*, 107 S. Ct. 2135 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). This goal must always be "that justice shall be done." *Id. See* EC 7-13, ABA Model Code of Professional Responsibility (1982).

[48] In his brief filed in the *Vuitton* litigation, the Solicitor General acknowledged the propriety of judicial appointment of prosecutors where there is "substantial justification" and "conformity with principles of fairness, sound judicial administration, and disinterested exercise of federal prosecutorial responsibility." Brief for the United States as *Amicus Curiae*, *Young v. U.S. ex rel. Vuitton et Fils, S.A.*, Nos. 85-1329 & 85-6207 at 1-2 (U.S., filed October 1986). The Solicitor General specifically pointed to the Independent Counsel as an appropriate departure from the norm. *Id.* at 19 n.14.

Similarly, as the Justice Department testified during initial enactment of the ethics law, *Public Officials Integrity Act of 1977, Hearings, supra* note 16, at 15–17 (testimony of John M. Harmon, Acting Assistant Attorney General of the Office of Legal Counsel), "[we] do not believe that an 'incongruous' duty would be imposed upon the courts. *See Ex Parte Siebold*, 100 U.S. 371, 398 (1879)."

The challengers have argued that they "may be impelled to engage in subtle calculations concerning the possibility of offending the court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges." Slip op. at 86. Considering that every appeal, including this one, involves "pointing" to alleged mistakes by "fellow judges," the challengers should be able to find counsel experienced with those "subtle calculations."

III. INDEPENDENT COUNSELS COMPORT WITH "FAITHFUL EXECUTION"

A final request to strike down this Act of Congress relates to the "Faithful Execution" Clause. The challengers repeatedly invoke this Clause as the textual basis for their criticism of the lack of supervision of the Independent Counsel by the Attorney General, of the lack of authority for him to remove her (other than for "good cause"), and of her supposed "supervision" by the Judiciary. Slip op. at 24, 26, 30, 52, 60 (quoting or citing the "Faithful Execution" Clause). From this Clause, they derived a thoroughly novel theory of "a unitary executive" with the President possessing universal power to direct and remove every officer, whatever his legal duties or the potential for conflicts of interest, so long as throughout the government "the chain of command leads directly upward to the President." Slip op. at 27. This issue the challengers frame in terms of how their "protection . . . is taken away," slip op. at 70, meaning that they lose the protection they would receive from the Attorney General dispensing with the enforcement of law that an independent prosecutor deems appropriate.

Indisputably, the Ethics Act seeks to redress the problems found during Watergate by limiting the ability of White House or Justice Department officials to dispense with, or otherwise undermine, investigations and prosecutions of high government officials. The act seeks to avoid future John Deans and Saturday Night Massacres, as well as the subtler problems of conflict of interest, bias, and loss of public confidence in the administration of justice. Those who read into the "Faithful Execution" Clause a guaranteed "unitary" government organization, and an inherent presidential prerogative for the President to dispense with prosecutorial steps, ignore the Clause's evident meaning. By its wording and history, the "Faithful Execution" Clause exists primarily to limit Executive power, and not as a basis for the Executive to have laws struck down. As Justices Frankfurter and

Holmes said, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Holmes, J.).

The Clause derives from the historic conflicts between Parliament and the Stuart monarchy in 17th century England. James II claimed, as King, that he possessed "suspending" and "dispensing" powers, which allowed him to decide for himself that at some times or for some people, certain laws need not be obeyed. The British courts rejected that claim in 1688, shortly after which the Glorious Revolution forced James II into exile and the English Bill of Rights was enacted.[49] That historic charter of freedom declared that "the pretended power of *suspending of laws, or the execution of laws* by regall authority, without consent of Parlyament is *illegal*." 1 W. & M., sess. 2, ch. 2 (1688) (emphasis supplied). "Scholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' abolition of the 'suspending power,' that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of Suspending,'. . . ." [50]

As Justice Jackson noted, "[t]he example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

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[49] *See Ameron Inc. v. U.S. Army Corps of Engineers*, 610 F. Supp. 750, 755 (D.N.J. 1985), *aff'd*, 809 F.2d 979 (3d Cir. 1986), *pet. for cert. filed*, 56 U.S.L.W. 3116 (U.S. July 27, 1987) (No. 87-163); *The President's Suspension of the Competition in Contracting Act is Unconstitutional:* H.R. Rep. No. 138, 99th Cong., 1st Sess. 8-16 (1985); *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 264 (1985); Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 Hastings Con. L. Quart. 398, 321 (1976); Stewart, *The Trial of the Seven Bishops*, Cal. St. Bar. J., Feb. 1980, at 70.

[50] *Ameron*, 610 F. Supp. at 755; *see* Reinstein, *supra* note 47.

579, 641 (1952) (concurring opinion). Several states included provisions in their original constitutions akin to the English Bill of Rights,[51] and the Constitutional Convention rejected the proposal that the President be empowered to "suspend" the laws.[52] Instead, following the model of the English Bill of Rights, the Framers adopted the "Faithful Execution" Clause to limit, not to expand, the Executive's power. As Judge Ginsburg observed:

> However, it is far from evident that the duty to "take Care" was intended to establish unbridled authority in the President and his men. More plausibly, the words were meant to import a limitation: "Indeed, the Framers probably included the 'faithful execution' clause in the Constitution to limit, not expand, the President's power. The clause was intended to rule out any power for him to dispense with, or suspend, the execution of the laws. Thus, the President may not always have the power to direct the execution of the laws, but merely a duty to do so when the laws have not excluded his direction." [53]

In this respect, the challengers overlook this Court's historic decisions on this subject. *Marbury v. Madison*, 5 U.S.

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[51] "The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature . . . ." N.H. Const, art. XXIX (1784); "[the Governor has the duty] to take care that the laws are faithfully executed to the best of his ability," N.Y. Const., Art. XIX (1777); "all powers of suspending laws, or the execution of laws, by any authority . . . ought not to be exercised," N.C. Const., art. V (1776); "[the President, with the council,] are also to take care that the laws be faithfully executed," Pa. Const., sec. 20 (1776); "all power of suspending laws, or the execution of laws, by any authority . . . ought not to be exercised . . . ." Va. Const., sec. 7 (1776).

[52] A proposal was made in the Constitutional Convention "that the national executive have a power to suspend any legislative act . . . ." The Convention rejected the proposal. IV J. Elliot, *Debates in the Federal Convention* 623 (2d ed. 1836).

[53] Slip op. at 14 n. 19 (dissenting opinion) (quoting *Independent Officers*, *supra* note 27, 63 B.U.L. Rev. at 90).

(1 Cranch) 137, 170–71 (1803); *Kendall v. United States ex. rel Stokes*, 37 U.S. (12 Pet.) 524, 616 (1838).[54] "[T]o contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall v. United States ex. rel Stokes*, 37 U.S. (12 Pet.) 524, 616 (1838). See page 19, *supra*.

With respect to the particular question of the modest "for cause" restriction on the Attorney General's power to remove the Independent Counsel, the Supreme Court has long upheld such restrictions. As early as 1886, the Supreme Court held that as to inferior officers, such as the independent counsel, the "constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to officers so appointed." *United States v. Perkins*, 116 U.S. 483, 485 (1886). The Court rejected the argument that the removability provision there challenged was "an infringement upon the constitutional prerogative of the Executive," holding instead that the Congress "may limit and restrict the power of removal as it deems best." *Id.* at 485.[55]

Subsequent cases similarly sustain the Ethics Act's removal provision. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), upholds the existence of independent agencies or officers, statutorily insulated from removal without cause by the Executive Branch. The Court's reasoning upholding the constitutionality of independent

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[54] *Kendall* challenges the "vesting in the President [of] a dispensing power," *id.*, 37 U.S. (12 Pet.) at 613, a phrase hearkening back to the two claimed powers, dispensing and suspending, of the English King which had underlain the English Bill of Rights' provision from whence developed the "Faithful Execution" Clause. *See Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420); *United States v. Smith and Ogden*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,341a); II G.L. Haskins & H.A. Johnson, *History of the Supreme Court of the United States* 298–304 (1981) (*Gilchrist* case); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285, 309–21 (1950); Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 1 n. 3 (1983).

[55] *Perkins* was cited with approval even in the case constituting the zenith in enthusiasm for exclusive executive removal. *See Myers v. United States*, 272 U.S. at 161.

agencies, many of which have law enforcement powers, applies with equal force to the Independent Counsel. In reaching its conclusion that independent agencies were constitutionally valid, the Supreme Court stressed the legislative determination that the agency in question must be "non-partisan" and "from the very nature of its duties, act with entire impartiality." *Id.* at 624; *see also id.* at 625. "[I]n the contemplation of the statute," the agency's duties could only be effectively performed "without executive leave" and "free from executive control." *Id.* at 628.[56] In *Wiener v. United States*, 357 U.S. 349 (1958), the Court went so far as to imply restrictions where the challenged statute was actually silent. The Court pointed to "the nature of the function that Congress had vested" in the officer as the crucial factor in determining the existence and propriety of limitations on the Executive's power of removal. *Id.* at 353–54.

For the Attorney General to dispense with prosecutions against officials close to him, whether through instructions on through removal of the Independent Counsel, would violate the essential purpose of the "Faithful Execution" Clause. As the Court noted in *Bowsher*, 106 S. Ct. at 3191, removability leads to subservience. The Act's limitations on removability ensure that the Independent Counsel enjoys some *bona fide* independence while leaving the Attorney General considerable latitude to act in any situation where genuine grounds exist for removal.[57]

[56] This Court again displayed its strong belief in the constitutional validity of independent agencies in *Schor*, where it disparaged "formalistic and unbending rules." 106 S. Ct. at 3258. *Schor* advocated "[l]ooking beyond form to the substance of what Congress has done" and "weigh[ing] a number of factors . . . with an eye to the practical effect that the Congressional action will have on the constitutionally assigned role." *Id.* In upholding the challenged statute, the Court in *Schor* accepted "evidence of valid and specific legislative necessities" and of the likelihood that a contrary result would " 'defeat the obvious purpose of the legislation.' " *Id.* at 3258 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

IV. CONCLUSION

The Ethics Act prevents the impression that high government officers receive improper "dispensations" from the rule of law because of their relationship to those controlling the prosecution. Like the legislation upheld in *Schor*, it is untainted by Congressional "self-aggrandizement." Rather, it tracks the plain language of the Appointments Clause in vesting appointment in the "Courts of Law," and comports with the clear intent of the "Faithful Execution" clause in its carefully crafted restrictions on Executive dispensing power. This Court should uphold this Act of Congress.

[57] The challengers also argue that the Ethics Act creates further constitutional problems when an "independent counsel adopts positions at odds with the remainder of the Executive Branch." Slip op. at 57. It is difficult to see the problem. A state criminal prosecutor may present a state court with a position that the federal State Department opposes. In that case, the court accepts the State Department position, or the prosecution's position, depending on the issue. *Cf. Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (state case touching on foreign affairs; Department of Justice appears as *amicus curiae*). This system works well for the many commercial cases in which the courts reconcile the position of the State Department with that of other parties, *see, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 761 (1972) (resuming case after earlier "vacat[ing] the judgment of the Court of Appeals for consideration of the views of the Department of State"). The Justice Department has not been shy about presenting its views separately in past cases handled by special prosecutors, *see United States v. Nixon*, and does not seem to be so in this case.

Respectfully submitted,

STEVEN R. ROSS,
General Counsel to the Clerk.
CHARLES TIEFER,
Deputy General Counsel to the Clerk.
MICHAEL L. MURRAY,
JANINA JARUZELSKI,
Assistant Counsels to the Clerk.
U.S. House of Representatives,
The Capitol, H-105
Washington, D.C. 20515
(202) 225-9700
Attorneys for Speaker and Leadership Group.

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